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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. ...75-271

PACKAGING INDUSTRIES, INC.,

Petitioner,

against

DIEMATIC MANUFACTURING CORP.,

Respondent.

REPLY OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

	PAGE
Question Presented	1
Statement of the Case	2
Reasons For Not Granting the Writ	2
I. The Legal-Equitable Distinction Works	3
II. This Is Not An Appropriate Case To Overrule This Court's Earlier Decision	3
III. Petitioner Has Delayed This Case And Has Suffered No Hardship	4
Conclusion	5

TABLE OF AUTHORITIES

Cases:

Alexander v. *Pacific Maritime Ass'n*, 332 F.2d 266 (9th Cir. 1964), cert. den. 379 U.S. 882 (No. 343, Oct. Term 1964)	2
Baltimore Contractors v. *Bodinger*, 348 U.S. 176 (1955)	1, 2, 3
Wilson Bros. v. *Textile Workers Union*, 224 F.2d 176 (2nd Cir. 1955), cert. den. 350 U.S. 834 (No. 199, Oct. Term 1955)	2

Statutes:

28 U.S.C. § 1292(b)	2, 3
35 U.S.C. § 1292(a)(1)	3
9 Moore's Federal Practice § 110.20(3), page 240 (2nd Ed. 1973)	3
9 Moore's Federal Practice § 110.20(4), page 246 (2nd Ed. 1973)	4

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Question Presented

Should this Court, and the eleven Circuit Courts of Appeal, be burdened by additional interlocutory *non-discretionary* appeals in view of the practicality of this Court's present rule relating to interlocutory appeals from (i) an order denying a stay of civil action pending arbitration and (ii) an order enjoining arbitration?

or, rephrased,

Should this Court's decision in *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176 (1955) be overruled

(a) in the context of a complex patent action involving patents of both parties to, *inter alia*, impulse heat sealing, when arbitration could dispose of only the patent infringe-

ment issue and not the patent validity and patent enforcement and anti-trust issues;

(b) when there has been no particular difficulty by the Circuit Courts of Appeals in applying the "legal-equitable" distinction of *Baltimore Contractors* as to interlocutory appeals; and

(c) Congress has specifically provided for discretionary interlocutory appeals, under 28 U.S.C. § 1292(b), to avoid undue hardship?

Statement of the Case

An objective and accurate statement of the case is found in the opinion of the Court of Appeals (p. A4, A5 of Petition).

Reasons For Not Granting the Writ

This is another attempt to have this Court require additional interlocutory non-discretionary appeals and overrule this Court's decision in *Baltimore Contractors* v. *Bodinger*, 348 U.S. 176 (1955).

It involves a minor procedural question unnecessary for reconsideration by this Court.

Two prior petitions for writ of certiorari were filed on the same grounds presented by Petitioner in its Petition—both were denied without dissent. *Wilson Bros.* v. *Textile Workers Union*, 224 F.2d 176 (2nd Cir. 1955), cert. den. 350 U.S. 834 (No. 199, Oct. Term 1955); *Alexander* v. *Pacific Maritime Ass'n*, 332 F.2d 266 (9th Cir. 1964), cert. den. 379 U.S. 882 (No. 343, Oct. Term 1964).

Despite Petitioner's argument about the increase in arbitrations, no writ raising the question presented by Petitioner has been sought in over ten years.

I. The Legal-Equitable Distinction Works

In *Baltimore Contractors* this Court applied the so-called "Enlow-Ettelson" rule to permit interlocutory appeals from denial of a stay of an action pending arbitration, under 28 U.S.C. § 1292(a)(1), only if the action stayed is "legal" and not "equitable". 9 Moore's Federal Practice § 110.20(3), page 240 (2nd Ed. 1973). The Enlow-Ettelson rule is clear enough to lawyers and judges—and, more importantly, it has worked and continues to work.

Petitioner has been careful to not suggest an alternative to the *Baltimore Contractors* rule. But implicit in Petitioner's argument are the following alternatives: as one alternative, this Court could prohibit all interlocutory appeals from stays of the type here involved—but that would not do justice to 35 U.S.C. § 1292(a)(1); as another alternative, this Court could permit interlocutory appeals from all stays of the type here involved, opening the floodgates to a torrent of interlocutory appeals and contrary to the well-settled policy against piecemeal review.

Petitioner has cited 10 cases in which the *Baltimore Contractors* rule was applied. Those few cases involving *Baltimore* in the twenty years since it was decided demonstrate that *Baltimore* can be applied without practical difficulty.

The occasional comment the *Baltimore* rule engenders, as in Judge Mulligan's *obiter dicta* in this case, perhaps is less important than the fact that the *Baltimore* rule provides a pragmatic middle ground between permitting an "all or none" approach to interlocutory appeals of stays relating to arbitrations.

II. This Is Not An Appropriate Case To Overrule This Court's Earlier Decision

The present case involves two patents, patent validity issues, anti-trust issues, an arbitratiton clause of a patent

license, an earlier case which was terminated by a stipulated dismissal, laches, estoppel, and *res judicata*. It involves, as to arbitration, only the issue of infringement. The facts of the case—and many are in dispute—are complex.

The arbitration sought by Petitioner could determine only patent infringement, *one* issue in the case, and *not* the major issues from a public interest standpoint of patent validity and anti-trust.

Most importantly, even if Petitioner obtained a reversal of the District Court's orders, and also won in arbitration, Petitioner would have still been faced subsequently with a trial in the District Court. If the District Court's orders are upheld—as they have been thus far—all issues between the parties will be resolved in one forum and in one trial.

III. Petitioner Has Delayed This Case And Has Suffered No Hardship

Petitioner argues that, by being denied arbitration, it was denied speedy justice.

But if Petitioner had not appealed, and had not filed this Writ, the case might well have been tried by now. Petitioner has delayed this case by filing an attempt at an interlocutory appeal, and filed its Answer only last month, over a year after the Complaint was served.

There has been no serious irreparable injury to Petitioner's interests by the stay of arbitration, as Petitioner could have sought to have its appeal heard under The Interlocutory Appeals Act of 1958, 28 U.S.C. § 1292(b) which requires agreement by the courts involved that the appeal should have been heard, i.e., "is at the discretion of both the district court and the court of appeals. But that is as it should be in this area", *9 Moore's Federal Practice* § 110.20(4), page 246 (2nd Ed. 1973).

Conclusion

Respondent prays that the writ of certiorari be denied.

Respectfully submitted,

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